OCTOBER TERM 1948

No. 465

REPLY BRIEF OF PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 465

J. S. WOODS,

Petitioner,

vs.

INTERSTATE REALTY COMPANY,

Respondent

REPLY BRIEF OF PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary of Argument

I

Transacting business in the State by the respondent including the making of the contracts sued upon, violated the public policy of the State of Mississippi.

This case is officially reported, *Interstate Realty Company v. Woods*, 168 Fed. 2d, 701 and *Interstate Realty Company v. Woods*, 150 Fed. 2d, 694.

II

It is immaterial whether the contract is absolutely void or merely unenforceable.

III

Cases distinguished.

ARGUMENT

Point I

Transacting business in the State by the respondent, including the making of the contracts sued upon, violated the public policy of the State of Mississippi.

Respondent's counsel, in their brief, present to the Court the view that transacting business in the State of Mississippi by the respondent and entering into the contracts sued upon was not a violation of the public policy of the State of Mississippi. Section 5319, Mississippi Code of 1942, Appendix "A" to Petition for Certiorari, requires a foreign corporation to appoint an agent for service of process and any corporation failing to comply therewith is prohibited from bringing or maintaining an action in any of the courts of the State. Appendix "C", Page 30 of Petition for Certiorari, requires a foreign corporation to file a certified copy of its charter before transacting business and for a failure so to do is subject to a fine of $100.00. Section 5344, Mississippi Code of 1942, Appendix "D" to Petition for Certiorari, Page 31, provides that any foreign corporation committing any act in the State *contrary to the laws or policy thereof* should not be permitted to recover thereupon. In order to ascertain the public policy of the State it is necessary to look at its statutes and judicial decisions. This question was expressly decided against

respondent by the Supreme Court of Mississippi in the case of *State ex rel. Attorney-General v. Edward Hines Lumber Co. et al.*, 106 Miss. 780, 64 So. 729. In that case it appeared that Section 903, Mississippi 1906 Code, limited the amount of property which any domestic corporation might own and provided a penalty therefor. The appellee in that case, a foreign corporation, acquired and owned property in excess of the statutory limit. Suit was brought by the Attorney-General to confiscate the property and was met with the defense that the prohibition applied only to domestic corporations and that a foreign corporation was not therein included. A copy of *Section 903, Mississippi 1906 Code*, is made *Appendix I* hereto. The Supreme Court of Mississippi, construing Section 849 of the Code of 1892 and Section 914 of the Code of 1906, said sections being in identical language with Section 5344, Mississippi Code of 1942, made Appendix "D" to the Petition for Certiorari, held that the appellee, a foreign corporation, was included within the prohibition and violated the public policy of the State of Mississippi. The court used the following language:

> "It seems clear to us that, inasmuch as foreign corporations 'may not do or commit any act in this State contrary to the laws or the policy thereof', it necessarily follows that such corporations may not do in this State what domestic corporations are prohibited from doing. The policy of this State with reference to limitations upon the value of corporate holdings is expressed in our statutes, and while it may be said that Section 849 of the Code of 1892 and Section 914 of the Code of 1906 are declaratory of the common-law rule of comity, yet it seems to us that, the laws and policy of this State being to limit the value of the holdings of domestic corporations, and to penalize domestic corporations for exceeding the statutory limit,

it was the intention of the legislature to apply to foreign corporations the same limitations; otherwise, this policy could be thwarted by the simple expedient of incorporating in other States.

"If the limitation is not an expression of the State's policy, binding upon all corporations and enforceable by a proper proceeding, foreign corporations would be free to gobble up all of the lands of the State, and thus defeat the effort of the legislature to carry out a wise and salutory purpose, clearly indicated by statutes forbidding corporations subject to its control from acquiring lands in excess of a fixed limit of value. There can be no doubt of the legislative intention to limit the size of corporations in this State, and it is difficult to imagine what laws and policies are referred to in Section 849, Code 1892, and Section 914, Code 1906, unless we construe these sections to mean that foreign corporations doing business here may also be forced to conform to the policy of the State, expressed in its statutes."

In the case of *United States* v. *Musgrave*, 160 Fed. 700, the court used the following language:

"The public policy of the government is not limited to such matters as are universally considered as injurious to the public interests, but any acts reasonably calculated to have that effect may be prohibited by statute, and thereupon they are against public policy. United States *v.* Freight Association, 166 U. S. 290, 340, 17 Sup. Ct. 540, 41 L. Ed. 1007; Logan & Bryan *v.* Postal-Tel. Co. (C.C.) 157 Fed. 570, 587.

"In the Freight Association Case the court, speaking by Mr. Justice Peckman, said on that subject:

" 'The public policy of the government is to be found in its statutes, or when they have not yet spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject over which

it has constitutional power to legislate, public policy in such a case is what the statute enacts.' "

In the case of *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832, the Court held that a state statute upheld by the highest court of the state is expressive of the public policy of the state. In support of this principle, respondent cites the case of *C. B. & Q. Ry. Co.* v. *Maguire*, 219 U. S. 549, 55 L. Ed. 328, where the following language is used:

> "The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the State. While the court, unaided by legislative declaration and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law . . . "

Counsel cite the case of *May* v. *Mulligan*, 36 F. Supp. 596, upon the question of public policy. The following rule is announced at page 598:

> " 'The public policy of a state, established either by express legislative enactment or by the decisions of its courts, is supreme and when once established will not, as a rule, be relaxed even on the ground of comity to enforce contracts, which, though valid where made, contravene public policy.
>
> " 'Courts which declare a contract void as against public policy are not declaring the intention of the parties, as in the ordinary case, but are acting under the obligation of the higher law, which requires the enforcement of that which is for the public good. . . . "

Section 5344, Mississippi 1942 Code, is plain, unambiguous and all embracing. A contract entered into in violation of the laws of the State is unenforceable in any

court. The respondent confessedly violated Sections 5319 and 5343, Mississippi 1942 Code, in making the contracts sued on and, therefore, the contracts were made in violation of law and in violation of the public policy of the State.

Point II

It is immaterial whether the contract is absolutely void or merely unenforceable.

Counsel for respondent present to the Court the view that the contracts sued upon by the respondent were not absolutely void but merely unenforceable. We now reaffirm the position taken in Petition for Certiorari and Brief thereupon that it is immaterial whether the contracts sued upon are absolutely void or merely unenforceable under the state law. The making of the contracts was in violation of the express provisions of the state statute and, therefore, necessarily, in violation of its public policy. It must be borne in mind that the unenforceability of the contracts sued upon by the respondent and the defense thereto set up by the petitioner is not entirely dependent upon the case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487, but upon the other hand the right of the respondent to recover and the defense of the petitioner is predicated under Section 34 of the Judiciary Act of 1789. Chapter 20, provides that, in making this application, 'laws of the several states' shall be regarded as 'rules of decision . . . in the courts of the United States, in cases where they apply'. In *Swift* v. *Tyson* the Supreme Court held that 'laws' as used in the statute did not embrace decisions of local tribunals but had reference to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intrater-

ritorial in their nature and character.' The federal courts were thus under obligation to follow state decisions in their interpretation of state statutes and with regard to property rights and other matters of a strictly local character, but were at liberty to decide for themselves what the law of the state was as to other matters.

In the case of *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 85 L. Ed. 109, where the court had under construction a statute of the State of New Jersey, the court used the following language:

> "The question has practical aspects of great importance in the proper administration of justice in the federal courts. It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship."

In the case of *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 204, 82 L. Ed. 1290, the court used the following language:

> "Application of the 'State law' to the present case, or any other controversy controlled by Erie R. Co. v. Tompkins, does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done in actions brought in the federal courts involving what were known as matters of 'local' law."

The unenforceability of the contracts sued on by the respondent, as well as the petitioner's defense, rests upon

the Mississippi statutes, and the rule applied in *Guaranty Trust Company of New York* v. *York*, 326 U. S. 99, 89 L. Ed. 2079, 160 A. L. R. 1231, applies. Narrowing the issues to the least common denominator, the precise question presented is as to whether or not the respondent might have recovered upon the contracts in question in the state court. It being conceded that no such recovery could be had, it is immaterial whether the contracts are absolutely void or merely unenforceable. The respondent could not walk across the street to the Federal Court and find a different system of jurisprudence. They could not escape the Mississippi statutes and public policy by going into the Federal Court. There is but one exception to this rule and that exception is that a state statute would not be enforced in a Federal Court which was merely procedural. In our brief in support of Petition for Certiorari we have elaborately pointed out that the Mississippi statutes involved are not merely procedural but are embodied in the substantive law of the State of Mississippi. Respondent's counsel have not contended in any brief that the statutes were merely procedural. We also pointed out in our original brief with considerable elaboration that a Federal Court sitting in a state is a State Court, an announcement not questioned by respondent's counsel. We have further pointed out that the Mississippi statutes involved do not deny the jurisdiction of Federal Courts to hear and determine the controversy. Upon the other hand, the respondent filed a suit in the United States District Court on the grounds of diversity of citizenship. The court took jurisdiction of the controversy but held that under the Mississippi statutes, decisions and public policy, the contracts sued upon were unenforceable.

Point III

Cases Distinguished

Counsel cite the case of *Long Beach Canning Company* v. *Clark*, 141 Miss. 177, 106 So. 646. In that case the court held that the mere fact that a foreign corporation had not qualified under the laws of the State of Mississippi did not prevent it from disposing of a single piece of property which it had acquired previously. The court held that the mere sale of a specific piece of property was not transacting business within the state.

The case of *Citizens Bank of Hattiesburg* v. *Grigsby*, 155 So. 684, 170 Miss. 655, merely held that a contract of a foreign corporation failing to comply with the state statutes did not void a conveyance of the property to a third person. The syllabi contains the following language at page 656:

> "Contract for purchase of property sold on foreclosure under deed of trust which had been executed to foreign corporation not having filed its charter within state held not void as to third persons purchasing property (Code 1930, section 4164)."

Counsel site the case of *Brace* v. *Gauges Construction Company*, Eighth Circuit, 36 Fed. (2d) 661. This case is controlled by *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832.

Counsel cite the case of *Newell Contracting Company* v. *State Highway Commission*, 195 Miss. 395, 15 So. (2d) 700. This is the latest case from the Supreme Court of Mississippi upon the subject. In that case, within a month after the foreign corporation entered into the contract in question, it fully complied with the statutes of the State of Mississippi and completed the contract involved thereafter. The court held that the contract was void and unenforce-

able except as to a supplemental contract entered into subsequent to compliance by the foreign corporation. The statutes involved are not mere revenue statutes but were enacted in the exercise of the police power of the state and expressive of its public policy. It is important that a foreign corporation designate an agent for service of process. The fee of $5.00 charged therefor bears no relation to the importance of the act. The legislature deemed it important that persons suing a foreign corporation should have definite information as to the service of process. Besides, the appointment of such an agent fixed the venue of such foreign corporation. *Nerbo* v. *Bethlehem Shipbuilding Corporation*, 308 U. S. 365, 84 L. Ed. 167. Likewise, the requirements that a foreign corporation file its charter was not purely for revenue purposes since the information therein contained would be a matter of concern to the state as well as persons dealing with the corporation.

We respectfully submit that the writ of certiorari should be granted as prayed for in the petition.

Respectfully submitted.

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I, William H. Watkins, of counsel for the petitioner in the above entitled case, certify that I have this day sent by United States mail, postage prepaid, to John A. Osionach,

Memphis, Tennessee, L. C. Andrews, Oxford, Mississippi, Phil A. Stone, Oxford, Mississippi, Attorneys for the Respondent, a true and correct copy of the foregoing brief this, the 22nd day of January, 1949.

WILLIAM H. WATKINS,
Of Counsel.

APPENDIX I

Section 903, Mississippi 1906 Code

Limitation on Corporate Holdings—Every corporation of the classes to be or heretofore created under the provisions of this chapter or the laws of this state may hold personal property in any amount necessary and proper for its uses and purposes, and every such corporation, except manufacturing corporations, may hold lands necessary for its purposes to an amount in value not exceeding one million dollars; manufacturing corporations may hold land to an amount not exceeding two million dollars in value, but building, machinery and other fixtures on such land shall be excluded in valuing land. And a corporation shall not have a trust, use or benefit in property held in the name of any person or corporation for its use either expressly or secretly, to a greater amount than it may lawfully hold, nor shall any corporation employ its capital, money or other thing in any way other than in pursuit of its legitimate business; and a corporation offending against any of these provisions shall forfeit its charter and shall also forfeit to the state all real estate held above that which it may lawfully hold, but an increase in the market value of real estate after it has been acquired by a corporation over the limit it was or is authorized to hold shall not operate to forfeit either the charter or any part of the real estate of such corporation. Nothing herein contained shall prevent a corporation from taking land or a lien on land to a greater amount than it may lawfully hold in payment of or as a security for a debt, if the same shall not be held for a longer period than ten years.